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No. 673

In the Supreme Court of the United States

October Term, 1951

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CORTLANDT R. TURNEY, Petitioner

v.

HOME INSURANCE COMPANY, The

- - - - - - - -

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

- - - - - - - -

Cortlandt R. Turney, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 26, 1951.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (Tr. 206) were dated March 16, 1951, and are unreported. The judgment of the Court of Appeals for the Third Circuit, affirming without opinion the judgment of the District Court, is reported at 192 F. 2d 1023.

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Act permits a veteran to be discharged immediately and solely because he brings suit to enforce his rights under the Act.

2. Whether an action to enforce reemployment rights may be dismissed on the ground that more than a year has elapsed since the veteran was reinstated, in the absence of a finding that the employee would not in fact have been promoted in seniority order to the position he claims where the only evidence concerning the promotion is that promotions were made in seniority order.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. 308, are set forth in the Appendix.

STATEMENT

This is an action to enforce a veteran's reemployment rights and damages under Section 8 of the Selective Training and Service Act of 1940, as amended. Respondent discharged petitioner instantly upon the start of this action, as the trial court found, solely on account of the bringing of the action. (P25a-Tr.13; P66a-Tr.212).

Petitioner claims not less than one year in correct employment on the same terms and conditions affecting all other employees in the Investment Department of respondent, and asserts claim to the positions now held by the two employees who were employed by respondent subsequent to the date on which he was employed, and who, promoted during the World War II years while petitioner was in the armed forces, were subsequently again promoted and are now Vice-President and Secretary, and Secretary, respectively, of respondent. Both admitted that promotions in the Investment Department were by seniority, and both were in fact promoted each time when they had the longest seniority except for petitioner. Respondent did not even attempt to prove that all positions to which the veteran had a lawful claim are held by employees senior to him. Such proof would have required respondent to reverse the facts.

Respondent is the largest fire insurance company in the United States. Profits before Federal income taxes in 1949 were more than $ 30,500,000.00. The Investment Department has doubled in size over what it was pre World War II. Respondent has some 30 vice-presidents, most of whom are in charge of separate departments. There are some 60

secretaries and assistant secretaries. [1]

There is no claim by respondent that it was unreasonable or impossible to grant petitioner's claim.

There is no super-seniority involved. There is no attempt to gain seniority relative to other employees but only to hold the previous relative seniority.

It is conceded that petitioner met all of the provisions of the statutory requirements.

There were only two employees, other than clerical, in the Investment Department of respondent and they were both officers of respondent (both were employed subsequent to the employment of petitioner), and both admitted that all employees were promoted on the basis of seniority except that the petitioner veteran would never be promoted regardless of seniority or ability.

Petitioner was employed by respondent in October, 1933 as an investment analyst and, except for service in the Army of the United States in 1941 and from 1942 to 1946, continued in the employ of respondent until he was discharged August 23, 1950 on the filing of this suit and for the sole reason that he filed this suit. Petitioner has never been employed by any other employer except respondent since 1933 and would, if reemployed, receive pension rights in another year. $ 11,000.00 of life insurance and other benefits were also lost.

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[1] For the purposes of this writ, petitioner asserts claim to priority over Bayles as to promotion to Assistant Secretary and to Secretary. Petitioner reserves the right, if the writ be allowed, to assert that the facts showed also his right to promotion to vice-president.

there are some 30 vice-presidents of respondent. The by-laws provide:

> "The several vice-presidents shall aid the president in his duties and advise him in regard to the general interest of the company and shall perform such duties as may from time to time be assigned to them by the president." (P39a-Tr. 52).

The present Vice-President and Secretary in charge of the Investment Department (Sedgwick) was employed in November, 1933 as an investment analyst. He was overage for military service. The annual report of respondent shows that, except for government securities, most of the investments are in the very largest corporations and almost all of the other investments are in very large corporations. There is no requirement of great ability to adopt that policy for the largest fire insurance company in the United States. It did not require great ability to destroy the position of petitioner while he was in the armed forces five years, nor did it require great ability to discharge him instantly when he invoked the Act. Sedgwick acthally interviewed outside sources of information on current investment news, coordinated recommendations of the investment analysts to the finance committee, and performed miscellaneous incidental duties, all of which petitioner had done intermittently for respondent for many years.

The present Secretary of the Investment Department (Bayles) was employed, with no experience, in 1936 as an investment analyst trainee at a salary of $ 100.00 per month. He was permanently 4-F with diabetes. When petitioner entered the armed forces, Bayles had advanced to a salary 2/3ds of that of petitioner.

The District Court's opinion and judgment was based on the first year of allegedly proper reemployment, but which was actually in an admittedly totally unrelated and then abolished job, and the misapprehension by the District Court that:

> "and all of this has got to be within the framework of one year because that is all that the courts have in their furtherest liberality construed this statute to give***." (P69a-Tr.216).

The court below was of the opinion that the only requirement for respondent was that it pay, for one year, to petitioner, more than he received when he entered the armed forces, and employ him in some way during that year. The trial court conceded ability and would not even receive evidence as to ability although respondent claimed that ability was required for promotion. (Tr. 44). (R2a-R3a).

The fundamental point, of course, is whether the intent of the statute actually protects the moving escalator position of the veteran when he cannot be there to protect it himself by reason that he is in the armed forces, and whether the larger number of persons who do not serve in the armed forces can discriminate against the smaller number of persons who do serve in the armed forces.

Petitioner asserts that the judgment was based upon a misapprehension by the court below as to the law of the matter, and asserts that he was never properly reemployed, and that he frequently protested to respondent the various improper and abolished positions in which respondent asserts that he was reemployed.

REASONS FOR GRANTING THE WRIT

Three questions under the reemployment provisions of the Selective Training and Service Act of 1940[2] which appear to be of importance in the lives of a substantial number of young men in the United States for many years in the future are contained in this case.

1. The asserted right of an employer to attempt to intimidate an employee veteran of many years seniority by instantly discharging the veteran when he invokes the statute, and keeping him without a job during the years while the case is in the Federal Courts (which would appear to be contrary to dicta of all members of this Court in Trailmobile v. Whirls, 331 U.S. 40), is contrary to the intent of the Congress at the time when the bill was passed and is also unlawful in that it vitiates the effectiveness of the Act. This involves the veteran in a direct and crucial way and necessarily involves the question of whether the Act leaves him defenseless.

> "Mr. O'CONNOR. ***We are taking these men out of their work. We are ~~making~~ putting them into the Army at $ 30 a month. We ought to go the limit in trying to guarantee their jobs when they come back.
> Mr. CELLER. I agree with you. I am simply trying to get your point of view". 86 Cong. Rec. 11697.

> "Mr. SACKS. ***I would not care how busy he [the Federal district attorney] was or how many he had to attend. I think the important thing here is taking care of those that we are taking away from their regular employment.
> Mr. MAY. That is what we are trying to do. We are not looking after the employer. We are looking after the enrollee-the man that we impose the burden on." 86 Cong. Rec. 11698.

> "Mr. MAY. The gentleman will recall that we discussed the matter of not humiliating these men by having them to sue in pauperis.
> Mr. THOMASON. That is true." 86 Cong. Rec. 11699.

Petitioner seeks the full remedies inasmuch as it is perfectly apparent that respondent will again discharge petitioner at the end of one year.

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[2] Later statutes continuing the importance of the interpretation included the Selective Service Act of 1948, 62 Stat. 604, and the Universal Military Training and Service Act of 1951, 65 Stat. 75.

Respondent states that this case has nothing whatever to do with the National Labor Relations Act, but this is clearly not so.

The Selective Training and Service Act of 1940 started as the Burke-Wadsworth bill--S.4164[3] (which was passed) and the companion H.R. 10132[4]. The House bill, as amended, was reprinted only once, on August 29, 1940, before it was substituted for the Senate bill and sent to conference. The Senate bill was amended and reprinted many times. The August 5th draft contained a subsection which provided:

> "The failure or refusal of any private employer to comply with the provisions of paragraph (B) of subsection (b) or with the provisions of subsection (c) shall be an unfair labor practice within the meaning of and for all the purposes of the National Labor Relations Act".

Mr. SHEPPARD, Chairman of the Committee on Military Affairs reported the bill, as amended to August 5, 1940 with Senate Report No. 2002. The bill, as amended to August 8, 1940, was printed in full, 86 Cong. Rec. 10077-9. The House amended the bill to increase its strength on behalf of veterans, and believed that direct action by the United States District Attorney on behalf of veterans would be more effective than action by the National Labor Relations Board. This was shown in the Congressional Record with unmistakable clearness.

> "Mr. THOMASON (of Texas, a member of the conference committee). ***Let me recall to your mind that the Senate bill came to us with the provision that the National Labor Relations Board was to take care of all these boys and see to it that they got their jobs back. Frankly, the principle involved in that was sound. There was so much opposition on both sides of the House to the personnel of the National Labor Relations Board that the Members were not willing to trust them with it". 86 Cong. Rec. 11699.
>
> "Mr. THOMASON. ***as I view it, unless you put it under the National Labor Relations Board, you cannot enforce this statute except by some means or manner of contempt proceedings.
>
> Mr. DISNEY. I would not want it put under the National Labor Relations Board under any circumstances". 86 Cong. Rec. 11700.

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[3] 86 Cong. Rec. 8680, June 20, 1940

[4] 86 Cong. Rec. 8908, June 21, 1940.

"Mr. MAY. ***the House committee did everything it could to protedt every class of these enrollees. If we overlooked anything it was unintentional". 86 Cong. Rec. 11369.

"Mr. MAY. ***It is not the type of injunction *** that is important; it is the right or the rights of the individual that is important". 86 Cong. Rec. 11700.

Mr. MAY had reported the bill, as amended to date, on August 29, 1940 with House Report No. 2903. At a later date, Mr. LEAVY stated:

"This Congress has power to appropriate as much money as is required to make this act workable and give full protection to the men involved. We want to do everything we can for the men." 86 Cong. Rec. 11702.

Mr. GURNEY, one of the managers of the conference on the part of the Senate, proposed an amendment on August 23, 1940 adding the "United States district attorney" reference so as to make S.4164 agree with the latest amendment of H.R. 10132. 86 Cong. Rec. 10788, 10791.

The essential feature of profits for the employer is that good business results from continuity of operations, and the essential feature of the advancement or promotions of those who do not serve in the armed forces is that they profit both by the war prosperity and by reason of the fact that the departure of some of the staff into the armed services makes it easier for those who stay behind to take the good jobs for themselves. On the other hand, the essential feature of the veteran's case is that his career is interrupted by the service in the armed forces and his reemployment should come as a matter of course on the moving escalator unless good reason is shown why it should not occur, and certainly his action to invoke the statute is not at all reason for his discharge. Such action on the part of the employer denotes an attitude directly contrary to the entire purpose of the statute, and such action vitiates and nullifies the statute, and is discrimination prohibited by the mandate on reversal in Oakley v. Louisville & Nashville R. Co., 338 U.S. 278.

The Act treats the veteran "as though he had remained continuously in his civilian employment". / Oakley, supra. Inasmuch as non-veterans would have no occasion to invoke the statute, therefore the right to invoke the statute is peculiar to the veterans covered by the Act, and discrimination against such veterans on that ground is forbidden.

> "The men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service". Trailmobile v. Whirls, 331 U.S. 40, 58.

This Court has repeatedly stated similar views prohibiting discrimination against veterans: each opinion written by a differe justice.

> "***no practice of employers or agreements between employers and unions can cut down the service benefits which Congress has secured the veteran under the Act." Fishgold v. Sullivan Drydock Corp., 328 U.S. 275, 285.

> "It is therefore clear that Congress did not confer the rights given as an incident to restoration simply to leave the employer free to nullify them at will, once he made it." Trailmobile, supra.

> "All this presupposes, obviously, that an agreement ***is not a skilful device of hostility to veterans." Aeronautical Lodge v. Campbell, 337 U.S. 521.

Certainly no other reported case shows as much hostility of an employer towards an employee veteran as does the case now at bar.

2. The ruling that seniority and all other factors affecting the veteran's reemployment were circumscribed by a one year time limit from the date that he was placed back on the payroll would seem to be directly contrary to the opinion in Oakley v. Louisville & N. R. Co., supra, and is of widespread importance inasmuch as much more than half of all reemployed veterans continue in the employ of the same employer for more than 1 year. There are many cases in which seniority, money damages, and reemployment have extended to cover a total of more than one year. Hayes v. Boston & Maine R. Co., 160 F. 2d 325, C. A. 1, Thompson v. Chesapeake & Ohio Ry. Co, 76 F. Supp. 304, Anglin v. Chesapeake & Ohio Ry. Co., 77 F. Supp. 359, and the somewhat analogous case of Coyle v. Erie R. Co., 1 N.J.350

The rationale of the court's finding seems to have been that respondent discharged its obligation completely when it paid one year's salary in an amount more than previously. However, this overlooks completely the fact that seniority continues beyond the first year in all cases, including the present case in which the reemployment was unlike in seniority and status, and respondent conceded that it was an entirely different job, so that, as a matter of law, petitioner was entitled to have his seniority continue for more than one year. The position in which he was reemployed was clearly one of the "certain types of discharges or demotions that might rob the veteran's reemployment of its substance". Oakley, supra.

The correct reemployment includes not only a money payment but also retraining in the employer's position.

> "***And the offer of a year's salary without working would not accord to the veteran the opportunity to reacquire skills and business habits which appears to be the purpose of the Act***". Martin v. Doane, 68 F. Supp. 783, C. A. 1.

Moreover, adjudication in the Federal courts of the rights of a returning veteran takes more than a year so that necessarily all of this cannot be done "within the framework of one year"/because mere money damages at a later date are (P69a-Tr.216) not sufficient remedy. Otherwise, an employer who wishes to pay a returning veteran a year's salary but not give him a chance to reacquire skill by actual work in the correct job can merely refuse to allow the returning veteran on the premises and say to him, "You have no possible way of obtaining a remedy at law under the Act - it will take more than a year to adjudicate the matter and by that time you will have no rights whatsoever".

Inasmuch as the Circuit Court gave a PER CURIAM decision dated December 26, 1951, petitioner assumes that the Circuit Court was familiar with the escalator principle (it was discussed at the oral argument) and applied it to this case, so that the Circuit Court affirmed on the basis of the trial court's opinion that seniority rights do not survive one year. However, it is interesting to note that the paragraph in the Trailmobile case which the trial court cited as authority for the opinion was the exact paragraph in the Oakley case with the diametrically opposed opinion. Supra, at 283.

3. The decision appears to be in direct conflict with Morris v. Chesapeake & Ohio Ry. Co., 171 F. 2d 579 (C.A. 7, 1948), cert. den. 336 U.S. 967 (1949), Conner v. Pennsylvania R. Co., 177 F. 2d 854 (C.A. D.C. 1949), cert. den. 339 U.S. 919 (1950), Houghton v. Texas State Life Insurance Company, 166 F. 2d 848 (C.A. 5, 1948) cert. den. 335 U.S. 822 (1948), Spession v. Thompson, 167 F.2d 626, cert. den. 335 U.S. 822, Freeman v. Gateway Baking Co., 68 F. 2d 383 (D.C. W.D. Ark.), and with the escalator principle enunciated in Fishgold v. Sullivan Drydock Corp., 328 U.S. 275 (1946), Aeronautical Lodge v. Campbell, 337 U.S. 521, (1949), Haynes v. Cincinnati, N. O. & T.P. Ry., 338 U.S. 278 (1949), and Oakley v. Louisville & Nashville R. Co., supra. The court did not even attempt to justify the judgment and opinion on the "leave of absence theory". The court made no finding of fact as to whether petitioner would have been promoted if he had remained continuously at work. The court below should have found that seniority continues beyond one year and that petitioner would in fact have been promoted if he had remained continuously at work, by reason of the fact that both officers of the Investment Department admitted that promotions were by seniority. Respondent did not even meet the minimum requirements laid down in Ross v. Texas & New Orleans R. Co., 171 F. 2d 458 (C.A. 5, 1948), and the respondent failed absolutely in the required test that "company must be neither capricious nor arbitrary, but act in good faith". The two officers of respondent, having admitted that they applied the seniority test to all except petitioner, were required to apply it to him, but they also admitted that they did not do so. Respondent failed to give petitioner his correct position; respondent gave him an entirely different one. This was a "discharge without cause" within the meaning of the Act, as was argued successfully in Losh v. Kivo, 169 F. 2d 346, cert. den. 335 U.S. 891, and in Poor v. Torrington Co., 170 F. 2d 487. The latter case stated, "It is crystal clear that a demotion is the equivalent of a discharge".

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The conditions of employment are current conditions, as stated in Trailmobile v. Whirls, 331 U.S. 40 (1947), provided that they have not been unlawfully changed against the veteran. Conditions of employment change with changing technology, modernized production methods, and for other reasons, and the veteran is required to meet the new conditions. The employer should not be entitled to a "Heads I win, tails you lose" decision, and just as Whirls lost because he was required to meet current conditions, so petitioner should prevail in this action because both officers admitted that promotions were in accordance with seniority, and both were in fact promoted by seniority each time that they were promoted.

Not only was there frank and open discrimination against the veteran in the matter of promotions but also in the matter of retraining and in many other ways. Moreover, this Court has stated repeatedly that "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." Fishgold, supra.

It was stated in Anderson v. Schouweiler, 63 F. Supp. 802:

> "***we will examine first, the defense that this petitioner has sued the respondent in the State Court and by reason of that fact should not be reinstated now as manager of this respondent's business. It could just as well be said that the fact that the petitioner has filed suit in this Court to compel his re-employment would make it unwise and unjust to place him in the management and control of respondent's business. No man should be barred from any right given him under the laws of this land because he has appealed to the Courts to have his rights determined ...it is no defense to this action that this service man resorted to the Court to obtain from his employer what he felt was due him for services performed prior to his induction into the Army. To rule otherwise would simply be to say that all an employer would have to do to clear the way so that he would not be required to reemploy his employee upon his return from the service, would be to refuse to pay the last month's salary and then to say to the serviceman: "if you sue me it will create a break in our friendship; it will strain our personal relations and will make such a change in circumstances that I will not reemploy you."

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"***The filing of suit against respondent by petitioner in the State Court is no defense under the facts as proven in this case. The petition filed herein states a claim against the respondent and is supported by the evidence***men and women returned to civilian life from service in the armed forces of the United States***have been assured by Congress that they will be returned to the positions they occupied in civilian life.

"The Act under which petitioner is proceeding provides assurance of re-employment after the completion of military service required of our young men and women, and as this Court said in the case of Stockton v. Ford Motor Co., 61 F. Supp. 261, 264, 'Promises made to our service men are not to be construed as idle promises but should be construed as a solem obligation that the agreements we have made with them will be lived up to and renforced. To look for technical loop-holes which may relieve us of our responsibilities is unthinkable where the returned service man's interest is at stake,***.'

"When a man or woman returned from the service is denied re-employment, the testimony in support of the refusal to so re-employ must be clear, unequivocal and convincing before the Court would be justified in holding that the service man or woman should be denied such re-employment, particularly where an attempt is made to set aside a solem promise emanating from the Government of the United States. In this class of cases the presumptions are that the service or woman is entitled to be reinstated. The immense importance and necessity of the welfare of the one who has served, or who will hereafter serve in the armed forces of the United States, and the welfare of our Country as a whole, demand that such refusal should only be successful when the defense is clearly stated and fully sustantiated by the proof."

A somewhat analogous opinion was stated in another district.

"Youth must be served, but not at the expense of men who have worn the uniform and contrary to law." Niemiec v. Seattle Ranier Baseball Club, 67 F. Supp. 705.

The right of a veteran to share in the properity of the company which he left to enter the armed forces was brought out in another opinion.

"***We cannot say it is unreasonable unless we are to say that the returning serviceman shall not share in the abundant presperity when he returns. We are not prepared to go that far. Indeed, the tenor and purpose of the Act guide us in a different direction***." Levine v. Berman, 161 F. 2d 386, 389, cert. den. 332 U.S. 792.

Another reason for this viewpoint appeared in another opinion.

"***Were it not for this man and others like him this business might not have had the opportunity to grow. This store might have been reduced by bombs to a mass of rubble***." Mihalich v. F.W. Woolworth Co., 69 F. Supp. 497, 498.

The case of increased earnings to the employee veteran by reason of increased earnings to the employer was shown in Trustees Funds v. Dagy, 160 F. 2d 413.

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The Acts of Congress were clearly designed to prevent any disadvantage from accruing to a soldier because of his military service, Kephart v. United States, 74 F. Supp. 578.

The same opinion was shown in the Circuit Court for the District of Columbia Circuit.

> "***same seniority which he would have had had he not been in the service, and these rights include whatever rights to promotion employee would have had if he had not been in the service*** To allow these men to transfer but to place them at the bottom of the list would be to penalize them by reason of their being in the service. The Selective Training and Service Act was designed to prevent that type of treatment." Conner v. Pennsylvania R. Co., 177 F. 2d 854, cert. den. 339 U.S. 919.

Another opinion reached a similar conclusion in a case in which the veteran prevailed even though he had made a new contract subsequent to his tour of duty in the armed forces and was required to show that the contract was fraudulent.

> "***these findings; they make yet the clearer the picture which emerges of one employee going to war for three years and returning to find that an associate has reaped the reward in money and position by being able to stay with the job. To an outsider the conditions of the business would appear the same except for the obvious advantages resulting from wartime prosperity and the universal experience of the need to turn away, rather than to solicit, business during this period. This situation would seem peculiarly the case for the application of the remedial functions of the Act. The findings show that this is not the case of requiring the creation of a useless position for the veteran, cf. Kay v. General Cable Corporation, 3 Cir., 144 F. 2d 653, 655, but the granting of some equality of treatment with the stay-at-home employee who had originally been his junior. The similar cases of Loving v. Berman and Allyn v. Abad, both supra, are persuasive. The "escalator" referred to in Fishgold v. Sullivan Drydock & Repair Corporation, 328 U.S. 275, 284, 285, 66 S. Ct. 1105, 90 L. Ed. 1230, 167 A.L.R. 110, should not pass him by entirely, he should find himself upon it at some point near that of his associate upon whom fortune has smiled so benignly." Leah v. Kive, 169 F. 2d 346, cert. den. 335 U.S. 891.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CORTLANDT R. TURNEY,

Petitioner, Pro Se.

MARCH 1961

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APPENDIX

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S. C. App. 308, reads in part, as follows:

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year --
>
> ---
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> ---
>
> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

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I, Cortlandt R. Turney, Petitioner Pro Se, do hereby certify that on the 24th day of March, 1952, I served the attached Petition for a Writ of Certiorari on the respondent by depositing copy thereof in the United States mails, postpaid, addressed to Lum, Fairlie & Foster, attorneys for respondent, at 605 Broad Street, Newark, N.J.

CORTLANDT R. TURNEY
General Delivery
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 673

CORTLANDT R. TURNEY,

Petitioner,

vs.

THE HOME INSURANCE COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinion Below

The opinion below, constituting the findings of fact and conclusions of law of the District Court (P. 62a-71a) were dated March 14, 1951, and are unreported. The judgment of the Court of Appeals for the Third Circuit affirming without opinion the judgment of the District Court is reported at 192 F. 2nd 1023.

Statute Involved

The appropriate and pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 855, 50 USC App. 308, are correctly set forth in the Appendix (P. 17) of the Petition for Writ of Certiorari.

Statement of the Case

Petitioner, a railroad security analyst employed by the respondent in 1933, left respondent's employ for a brief period in 1941 and again for the period between January 1942 and January 1946 to serve in the armed forces.

He returned to the respondent's employ in September of 1946, received at that time a salary increase of $1,100 per year and was restored to his position in full compliance with the requirements of the appropriate provisions of the Selective Service Act.

Four years later petitioner instituted suit in the District Court claiming that the respondent promoted its employees on the basis of a system of seniority and asserting that because he had served longer than two other employees who had risen to executive positions in the Company, he had thereby become entitled to the office of Vice-President.

The District Court summarized its findings of fact as follows:

> "In short the issue here revolves itself into one as to whether the petitioner has carried the burden of establishing that this Company had a custom and practice whereby the employees, such as petitioner, would advance by reason of their seniority from position to position. I find no such proof offered or present in the petitioner's case. There is some showing that the persons who were employed longer than other persons were advanced, that is particularly in the case of Mr. Sedgwick and Mr. Randell, but there is little evidence to show any departure from any custom and practice in the treatment of the petitioner because there is no showing that there was originally any custom and practice. The people in this small department were advanced by reason of their recommendation to the higher officials, and then to the Board of Directors on

what were regarded as factors for promotion, sometimes including seniority." (P. 69a-70a)

ARGUMENT

1. The Decision Below Turns on Its Own Facts and Does Not Involve Any Question of Law Which Would Call for the Issuance of a Writ of Certiorari.

The decision below is not based upon any interpretation of the Selective Service Act at variance with the decisions in the other circuits or with the decisions of this Court. The concept of the moving escalator referred to in *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 90 L. Ed. 1230 (S. Ct. 1945), as well as the principle that a seniority status secured by the statute continues beyond the first year of reemployment (*Oakley* v. *Louisville & Nashville Railroad Co.*, 338 U.S. 278, 94 L. Ed. 87 (S. Ct. 1949)) are entirely consistent with the result reached by the District Court and unanimously concurred in by the Court of Appeals.

But in order for there to have been a seniority status within the meaning of the *Oakley* case, there would have had to be a contract (or custom or practice) establishing such seniority, as was made clear in footnote 21 of the opinion of this Court in *Trailmobile* v. *Whirls*, 331 U.S. 40, 91 L. Ed. 1328 (S. Ct. 1946). See also *Aeronautical Industrial District Lodge 727* v. *James L. Campbell*, 337 U.S. 521, 526, 93 L. Ed. 1513, 1518 (S. Ct. 1948).

The case was tried below on the theory that petitioner would establish facts showing that the respondent by its custom or practice applied a system of seniority by which persons would be appointed or elected to executive positions in the respondent company. Petitioner's counsel very early in the trial acknowledged to the Court that he would attempt to prove such a custom and practice. (R. 1a-2a)

With the failure of the petitioner to establish such facts,

with the finding of the District Court in favor of the respondent confirming such failure of proof (P. 69a-70a), and with the unanimous per curiam opinion of the Court of Appeals holding that "The questions presented by the appeal at bar are completely factual and need not be elaborated upon here", there was more than ample support for the application of Rule 52 of the Rules of Civil Procedure (28 USC, Rule 52) that findings of fact should not be disturbed on appeal unless clearly wrong, unsupported by the evidence.

2. The Petition Sets Forth, as Facts, Material Which Is Contrary to the Evidence as Well as Material Which Is Not in the Record.

Although petitioner was represented in the trial of the action below, his appeal and this petition are being prosecuted pro se. We recognize that a degree of liberality must of necessity be exercised in forgiving transgressions of this character committed by a litigant who does not have the assistance of counsel. We should have preferred to have avoided entirely any reference to the misstatements and exaggerations which the petition purports to present as facts were they not so gross in character and were they not so cumulative in their apparent effect.

In an effort to assist the Court in the determination of the fundamental issue we here summarize the major misstatements contained in the petition:

(a) Petitioner asserts and repeats that respondent or respondent's witnesses "admitted" that promotions in the department were made by seniority. But in fact, all of defendant's witnesses testified that other factors influenced promotions (R. 60a, R. 67a, R. 79a), one or two of them indicating that seniority might be considered when all other factors were equal. (R. 67a, R. 46a)

(b) The disparagement of the ability of Mr. Sedgewick and of Mr. Bayles, petitioner's superiors in the investment department, set forth on page 5 of the petition, are unsupported by the record.

(c) The charge, made on page 7 of the petition, that respondent attempted to intimidate the petitioner, is completely without factual foundation in the record. To the contrary, the record contains numerous instances of the respondent's generosity, kindness and consideration for the petitioner, particularly during the last four years of his employment with the Company. It shows that he received successive increments which raised his annual salary from $3,900 to $6,240 during that period (R. 4a), and it shows that he was held in high regard by the President of the Company for his ability as a railroad analyst. (R. 58a, R. 48a)

(d) The assertion on page 13 of the petition that "The Court made no finding of fact as to whether petitioner would have been promoted if he had remained continuously at work" is wrong. The Court did find in fact that he received "the normal increments that would have come to him had he been in the employ of the Company instead of the armed forces." (P. 66a) It also found that "he received other treatment such as was accorded the men who left the Company to go into the armed forces and indeed there is no dispute as to that." (P. 66a)

(e) Reference on page 14 of the petition to the decision in the case of *Anderson* v. *Schouweiler*, 63 F. Supp. 802 (D.C. Idaho, 1945) is not in point, for in that case, unlike the petitioner's, the employer had failed to meet his obligations under the Selective Service Act. In this case it has been found by two Courts that the employer did fully meet his obligations. As the District Court said in its findings of fact, what the petitioner sought here was not restoration, but "installation in the position of Vice-President of the respondent company." (P. 69a)

3. There Is No Conflict of Decisions Between the Decision of the Court of Appeals and the Decision of Any Other Court of Appeals, or of the Supreme Court.

The holding below is consistent with the ruling decisions. The point of conflict which the petitioner seeks to create can be reached only if we ignore the facts. Petitioner's challenge of the decision of the District Court as affirmed by the Court of Appeals, is based on the necessary presupposition that his employer had a fixed system of seniority. That is contrary to the record and contrary to the findings.

The only conflict which exists in this case is a conflict between the petitioner's version of the facts and the facts of the record as found by the Courts below.

Conclusion

The prayer of the petition should be denied because it is clear from the record and from the decisions of the District Court and the Court of Appeals that there is no question of law applicable to the facts of this case which has not been decided in accordance with the decisions of this Court and with the decisions of the other Courts of Appeal, and also because it appears from the record and from the opinion below that the issues were entirely factual and were decided in favor of the respondent on the basis of ample support in the record.

Respectfully submitted,

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